

LEGAL ETHICS¹

BY WILLIAM H. TAFT, LL.D., D.C.L.

Young men and women of the Boston University Law School: I am glad to be here. The Dean told me as we came up that he was a little afraid to introduce me, but I told him he might do so without recourse on him. He could thus avoid any implication of his approval of what I am going to say. This is not the first time I have been here, but I presume I am addressing young men and women who were not in the school when I was here before and this is a generation which knows not Joseph. However, a long life has made me impervious to embarrassments of that sort.

You are entitled to know the qualifications of the witness for such testimony as that which I shall bear to you. I confess that I cannot make a long array of experiences at the Bar. I have been at the Bar; I am an alleged lawyer, and for a long time after I was admitted to the Bar, I held office continuously. Whenever an office fell, my plate was up, and among other offices that fell my way were several that involved the practice at the Bar and others that involved a close observation of the practice. As Assistant Prosecuting Attorney, I had to conduct cases before the grand jury and in the criminal courts. As County Solicitor, I had to conduct litigation in the interest of the public, and then I was on the Bench, where I got my chief legal education at the expense of the public. The Bench offers a very good point of observation for observing ethics that ought to prevail and the lack of ethics that sometimes does prevail, at the Bar.

It is some time since I was in practice. My idea of ethics may have been modified by a demoralizing political experience that is thought to dull the fine sense of ethics of life in general. But since I left office, with the full consent of the American people, I have been a college professor, a professor of law. That is a resumption of moral attitude.

I have heard the utility of legal ethics denied. It is objected that if a lawyer is honest, there ought to be no difficulty in his following the right course. If he is lacking in probity of character,

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a discussion of ethics, it is said, will do him no particular good, because tempted to a crooked path by a pecuniary interest, he will yield. On the other hand, the upright man will not be so tempted.

Schopenhauer took this view of the practical value of general ethics. He said:

"It is impossible to teach virtue as it is to teach genius. It would be as foolish to expect our moral system to produce virtuous characters and saints as to expect the science of aesthetics to bring forth poets, sculptors and musicians."

To this view, Paulsen replies:

"I do not believe that ethics need be so fainthearted. Its first object, it is true, is to understand human strivings and modes of conduct, conditions and institutions, as well as their effects upon the individual and social life. But if knowledge is capable of influencing conduct, it is hard to understand why the knowledge of ethics alone should be fruitless in this respect. . . . It will be the business of ethics to invite the doubter and the inquirer to assist in the common effort to discover fixed principles which shall help the judgment to understand the aims and problems of life."

Paulsen's words have application to the rules of conduct that should prevail in the legal profession. An understanding of the high social purpose which the profession is to subserve, of the beneficial function it is to perform, and of the limitations upon professional action that should be self-enforced, it is essential that every lawyer should possess. Especially should it be imparted to those who are just beginning the practice of the law. Now is the time, young men and women, when you should study and learn in advance of actual experience and temptation, the morality of your profession.

A lack of knowledge of legal ethics has been made in some cases a ground for disbarment; or, to state the case exactly: A man was elected State's Attorney in one of the Western states, and when he came to qualify and took the oath, it was objected that he was disqualified because he had been disbarred; he objected that that was no reason. He was in office, the public had elected him, and there was no specific requirement that he should have a good moral character. The court looked into the statute and found that he was required to be competent and learned and to have a knowledge of legal ethics. The court found that this man, having been disbarred, was shown to be lacking in that knowledge of legal ethics that was a qualification essential to legal office, and so held him disqualified.

The morality of your profession comprehends more than the plain principles of morality and honesty which should be observed in ordinary life. Those, we may properly assume, have been bred

in you by your home environment and in the church. Legal ethics are rules to warn you from practices and associations into some of which a lawyer may be easily and innocently led, which may not always seem vicious, but which would make your profession an injury to the community, and prevent it from giving that high and useful service which is the only reason for its being.

Membership of the Bar requires from those who have assumed its obligations, a double allegiance, a duty towards one's client, and a duty toward the court and the public, obligations which though sometimes seemingly in conflict, are to be reconciled in such a way as best to promote the effective administration of justice and the peace of society. This reconciliation is one of the chief purposes of the formulation and study of the rules of legal ethics.

The actual practice of the profession of the law is often subject to criticisms, some just, some unjust. So, too, our courts have been attacked. Judges are lawyers. They ought to be trained practitioners and learned in the profession before they ascend the Bench, and generally they are. Our courts, as they are now conducted, and our profession, which is the handmaid of justice, are thus bound up together in one system. An attack upon the courts is an attack upon our profession, and an attack upon our profession is an attack upon the courts. The existence of such feeling against so important an institution as the courts and Bar together form, is a capital reason why we should subject ourselves to introspection, as it were, and after the closest scrutiny should evolve the rules and methods by which such evils as there are among us may be remedied.

You are just preparing to become lawyers. If there are good grounds for the claim that your profession is essential to good government, is necessary to justice, is the aegis of protection of individual rights, and you don't understand why this is so, then you ought not to be allowed to exercise the high function of a member of the Bar, and your practice is not likely to demonstrate its public benefit. You should make yourselves familiar with the reason why we must have lawyers and why and how they do good.

It is argued that we hold out for money to advocate the cause of anyone seeking our services, and that as both sides of a controversy can not be right, one must be wrong, and therefore, half of our number are always engaged in urging upon the court the unjust and the wrong side, and so are promoting injustice for pay. To this the answer is two-fold: First, a profession of the law, in which its members are not paid for their services by their clients, is impracticable. It has been attempted in several civilizations, but failure

has always followed. Second, when the profession is controlled by the rules of legal ethics adopted by it, and in the main enforced, the functions performed by advocates, both for the victorious and the defeated party, are indispensable to the administration of justice. It is my purpose, in opening this series of lectures on Legal Ethics, to elaborate somewhat these reasons for the being of our profession, because they will emphasize the importance of the rules of Legal Ethics and help in their formulation.

The need of a paid profession of lawyers and the practical impossibility and inutility of any other system of advocacy and legal aid in maintaining individual rights, is shown in the history of the Jews, the Romans, the English, and of our early Colonial days.

The Jews

The Mosaic Law had religious sanction. It controlled the entire life of the Jewish people. The High Priests were the actual ministers of justice, and the preservation of religion and law was united in them. Their assistants and their assessors, if I may call them such, in the tribunals of which the High Priests were the head, were the Scribes. The Scribes were learned in the law. They had a religious and priestly character themselves. They were the teachers of law as well. They were consulted by individuals as to the law, and they interpreted it with a view to its application to the various facts and issues which arose. Though thus consulted, they were under a rabbinical injunction not to take fees. They were "to make the knowledge of the law neither a crown wherewith to make a show, nor a spade wherewith to dig." Speaking of this, Professor Schurer, the historian, says:

"In Christ's censures of the Scribes and Pharisees, their covetousness is a special object of reproof. Hence, even if their instruction was given gratuitously, they certainly knew how to compensate themselves in some other way."

The Scribes were evidently supposed to occupy a disinterested position toward those who consulted them, and to be, in a sense, the associates of the Judges, and the motive which prompted their study of particular cases was intended to be only that of vindicators of general justice. The private litigants, however, who consulted them, were earnestly desirous to influence the Scribes' view of the law in their own behalf, to command the Scribes' skill in debate, and to bring this about they evaded the rule preventing fees, by giving presents in advance. This is one of the reasons which brought the condemnation of the Master on them as lawyers.

Rome

In Rome, the case was not very different. There, too, the progenitor of the lawyer was the priest, the Pontifex, mingling priestly, judicial and advisory functions. Then came the patronus, or the orator, a man of standing in the community, of wealth, who gathered about him freedmen and Plebeians as his supporters and defenders. They were known as his "*clientes*."

When the client became involved in a law suit, his patron appeared to advise the Judge, often not a learned magistrate, in the principles of law. The Patronus acted not as a paid partisan of his client, but only as his friend and a vindicator of general justice. He was not supposed to receive any compensation.

In the year 200 B.C., there was a law enacted called the "Cincian Law," requiring that service of this kind should be gratuitous; but the law was often violated. The favor of Patrons, able in the law, was secured by giving them in advance, presents called "*honoraria*." Cicero boasted that he never violated the Cincian Law, but historians of his period intimate that by secret loans and testamentary gifts, his practice was profitable. Augustus sought to enforce the Cincian law by its re-enactment, but it continued to be disregarded, and subsequent emperors contented themselves with fixing limits for the fees to be charged.

England

In England, for two hundred years after the Conquest, the priests were the only learned men, and they, too, like the Scribes, and Pontifices among the Jews and Romans, acted as judges and advisers of litigants. In Henry the Third's time, the Pope, by a bull, forbade priests to fit themselves in civil law or to act as advisers in respect to it. This indicates some abuses by them. Not until the reign of King John did laymen become lawyers. Thereafter bailiffs and under-sheriffs and underlings of the court acted as attorneys, cheated their clients, stirred up litigation for pay, and a statute forbidding them to practice had to be enacted. And to that I call your attention. The need of lawyers is shown by the fact that the people will have lawyers. Still, there does not seem to have been any English Statute absolutely forbidding lawyers from receiving compensation for their services. The taking of fees for such services was evidently frowned upon for a long time. It was never regarded as creating a debt due from the client to the lawyer, and that is true today as to barristers of law in England. They can make it a condition that there shall be a retainer; that is considered

proper practice and they may have as they go on, refreshers, but if they don't secure themselves or if they rely on the honor of their client and they suffer thereby, there is no cause of action. Still the payment of fees became and is now in practice an indispensable condition of the employment of barristers who conduct causes in court. Attorneys who deal with and advise clients, and prepare their cases to be handled by the barristers before the judges, have their fees fixed by statute and can sue for them.

The American Colonies

The evolution of the Bar in this country in American colonial times, and especially in New England, was a curious counterpart of the history of the English Bar three centuries before. When the Pilgrims and the Puritans came to this country, neither the common law nor the English judicial system appealed to them, and lawyers did not commend themselves. They left England at the time when the common law had become rigid, technical and unjust, and lawyers were the instruments of injustice. Moreover, they were active in religious prosecutions against the Puritans. Exclusion of the profession from the society which they were forming seemed an end devoutly to be wished, and was promptly enforced. There was not a lawyer among the Pilgrims, and there were only four or five who had been educated as lawyers among the Puritans and they had not practiced. During the 17th and far into the 18th century, lawyers had little place in the social, business or political institutions of the colonies. In New England, which was a theocracy, the judges were not lawyers. Many of them were ministers, and they were all under the influence of the clergy. They took their law from the laws of God as shown in the Scriptures. This must have given wide scope for difference and originality of view.

In the Massachusetts body of liberties, it was provided that a party unfit to plead might employ a person not objectionable to the court to plead for him, but this was on condition that he give him no fee or reward. There, we have reiterated the same necessity, that our profession should live by virtue alone. In 1663, a usual or common attorney was prohibited from sitting in the general court, showing that our profession was not highly regarded. As society progressed, however, as commerce and trade increased, as wealth grew, as business transactions became more extended, as learning spread from the clergy to other persons, opportunity and inducement were furnished for the study of law, and professional training became more general. The crying need for a learned and honorable

profession of the law was made manifest by the growth of a class of advocates and advisers whose influence was most pernicious. Without professional assistance, litigants who needed guidance consulted the under-bailiffs, the under-sheriffs and clerks and other underlings, who were without knowledge, but who with greed and utter lack of principle developed trickery and cheating, and stirred up litigation for their own profit. As in England three centuries before, so in New England, statutes had to be passed forbidding such underlings of the court to practice law at all. Thus the need of educated lawyers, with the right to adequate compensation for their services, had to be finally recognized by the colonies, years before the Revolution.

How, then, is the use of paid counsel, the need for which the experience of four great civilizations has demonstrated, to be reconciled with the promotion of justice and its successful administration?

Courts seek to hear and decide controversies between parties over facts and law. Rules of procedure are for the purpose of reducing the issues to as narrow and concrete form as possible. Men learned in the law and experienced in the preparation of evidence are in a position to assist the judge to a quick and thorough understanding of the exact question which he is to decide. If you don't believe it, try to hear a case where no lawyers are employed, as I have, in the National War Labor Board, and see how helpless you feel in dealing with advocates who don't understand the science of presenting a case. The real enthusiasm of advocacy which the relation of attorney and client always develops, is exerted in behalf of one side only, and might doubtless have a tendency to mislead the court; but where both sides are represented, where the same earnestness in the proceeding of each side is present, there is no method within human ken so well adapted to reach a sound conclusion as this. No one who has had experience on the Bench in reaching judicial judgments under a such system, and who has thereafter been obliged in an executive position to reach important, and, it may be, final determination of questions, can fail to recognize the powerful aid which counsel contribute to courts in reaching just conclusions. Counsel who argues the losing side of a case contributes quite as much to the assistance of the court as the successful advocate. It is the presentation of the case in all its aspects which helps. The friction of the conflicting argument develops every phase of possible error in any conclusion contended for, and so enables a just, intelligent and acute Judge, with long experience in maintaining a judicial attitude of mind, to see clearly the right. It

is well understood in the judicial weighing of legal precedents that the judgment of a court which has not had the benefit of the argument of counsel on both sides is much weakened. In some states, courts are required to answer questions of the legislature as to the constitutionality of proposed laws. These opinions are merely advisory, and they do not conclude the court, should the question subsequently arise in a litigated case. At least, that is the general view and evidently the correct one. The reason is, that the court in reaching its first conclusion does not have the benefit of the presentation of the issue by counsel on both sides. The earnest advocate searches not only libraries but his own brain for the strongest reasons in behalf of his client. Why is it that a great Bar makes a great court? A great Bar furnishes to the court all the reasons *pro* and *con* in every case, and offers to the court a selection of reasons developed by the ingenuity and interest of men able and skilled in the law, and put with all the force of which they are capable.

What is true in respect to the influence of the argument of counsel upon a Judge, on questions of law or fact, or on questions of law alone, is in a measure true in its influence upon a jury on issues of fact, especially in a system of procedure in which the Judge is able to assist the jury by commenting on the evidence, and clearing away the possible mist that may have been created by the eloquence of counsel and their appeals to the emotions of the jury.

The judge and jury are both advised that the counsel before them are earnest advocates, that they are receiving professional compensation, and that in saying what they do in behalf of their clients, they are partisans and not judges. The court and jury know that their own is a different function, and that they can have no sympathy with either side other than the sympathy aroused by the justice of the cause presented.

A lawyer, if governed by proper ethical considerations, must decline to conduct a civil cause or make a defense when convinced that it is intended merely to harrass or to injure the opposite party, or to work oppression or wrong. His appearance in court, therefore, is equivalent to an assertion on his honor that in his opinion his client's case is a debatable one and one proper for judicial determination. He is not obliged to act either as an adviser or as advocate for every person who may wish to become his client. He may not coach a witness to testify falsely. He must act within entire candor and fairness in his statements to the court, upon which he invokes its action. He must not knowingly misquote the contents of a paper or the testimony of a witness. He must not cite a decision that he knows has been overruled or a statute that

he knows has been repealed. He has a right to proceed in the view that his client is entitled to the benefit of every remedy and defense authorized by the law of the land, and that the lawyer is expected to assert every such remedy or defense. But he knows, too, that the great trust of the lawyer is to be formed within and not without the bounds of the law. It does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. In respect to the maintenance of these rules, he must obey his own conscience and not that of his client. The court and the jury have a right to believe that the lawyer is conducting the case under these rules. It is the compliance with these rules which truly reconciles the lawyer's duty of fidelity to the client, with the constant and ever present duty which the lawyer has as a part of the administration of justice, owing to the minister of justice in the person of the Judge.

These rules briefly stated are taken from the Code of Legal Ethics approved by the American Bar Association. If lawyers live up to them, the danger of injustice from the enthusiasm or skill or eloquence of their advocacy is quite remote. Lawyers differ in the fluency and cogency with which they present the cause of their respective clients. The client who is fortunate enough to engage the abler lawyer has, in the nature of things, the advantage. But that element of inequality it is impossible to eliminate from the administration of justice or from any field of human action. Difference in ability of counsel has more weight in a jury trial perhaps than it has before a court. If the jury is misled by the histrionic eloquence of counsel and justice is clearly violated in the jury's verdict, the court may always set it aside and give a new trial. Moreover, in any properly adjusted system, the judge should be able in his charge to bring the jury back to earth by clearing the atmosphere of false emotion that counsel, in his earnestness, has created both for himself and the jury, and remind them that they are judges, and are not to indulge the pleasure of yielding to their emotions or prejudices.

Now, the question is asked, do members of the Bar live up to these rules? I have known some lawyers who seem to take emotion in, as they would opium, just to have it possess themselves before a jury, and they are almost not responsible for what they say; they bring forth tears, they live again the lives of their clients. A great Ohio statesman and lawyer, Tom Corwin, was also a great humorist. He had a young man in his office named Durbin Ward. Durbin had no humor, but was very earnest. He lost his first case before a justice of the peace, and he went to Mr. Corwin to ask what he

should do. He said: "Durbin, take to the justice court twenty-five volumes of state reports and two volumes of statutes, and read from every volume and then bring out in every way to the Justice the injustice of his decision; hammer the table, and roar, Durbin; and weep bitter tears, for you cannot have true evidence without salt water. That will fetch him!"

While counsel differ in ethical sense, generally such rules as are above given are fairly well observed. The earnestness of advocacy sometimes blinds them to the proprieties and the requirements of candor and fairness. They fall into the same errors as their clients, though with clearer knowledge of their duties in this regard.

The tendency of legislatures has been to distrust judges and to take away from them the power to control the conduct of the trial, as that power is known in the English and Federal Courts. This change gives to counsel greater discretion, more freedom from restraint by the court and less fear of its remedial power. It creates greater temptation to depart from those ethical rules I have summarized. This hampering of the power of the court to prevent the misconduct of counsel in many Western states has not been conducive to certainty of justice. Yet we find the bitterest attacks upon the administration of justice and judges in those jurisdictions in which the people and the legislatures have minimized the authority of the judges, though they themselves have laid the foundation for the very abuses which they subsequently denounce.

I do not know of any time when it is more wholesome and more useful to society than now to bring home to lawyers the responsibility that is on them, not to depart from ethical rules of practice. Violation of them unfortunately is not confined to the youthful and less experienced. I have known older lawyers of experience and standing, to pettifog before juries in the hope of winning verdicts and succeed when the judge is weak, inexperienced, lazy, or inattentive.

There is a great difference in lawyers as to the self-respect they maintain in the advancement of legal propositions. There are able, skilled and learned lawyers who seem to think that they must advance any proposition of law, however lacking in authority or soundness, if it is essential to make their client's case. They are honorable men as the word goes. They would not mis-state facts, but when it comes to presenting an argument based on the law, they don't have the mental honesty or straightforwardness that requires them to advance their doubtful propositions tentatively and to reject propositions of law known to them to be unfounded. In the mind of an experienced judge, lawyers are divided

into those who are conscientious in the advancing of propositions of law and have a professional self-respect in this regard, and those who have not. In the long run, the lawyer who has not, loses his force and influence with the courts. Judges will accept nothing in respect of the law that such a lawyer advances without the closest examination, and while he seems to satisfy his client by the certainty of his position and the strength of his asseveration, what he says to the court only raises a query without carrying conviction.

I am saying these things, young men and women, to bring home to you, now about to enter the Bar, the practical advantage of holding yourselves in leash, as well as the moral reason of it. I would not minimize the necessity for earnestness, activity, industry, and zeal in behalf of your client, but I do not have to bring this home to you, for you probably have all the elements of broad human nature in you which will develop zeal. But what I would have borne in on your minds is that in the outset in your career at the Bar, you must regard your character and your reputation and your own conscience as of far higher importance than winning a particular case. If you have before you always as an ideal and as your highest ambition, to stand before the Bar as some of the great lawyers you know stand with their fellow members, and never do anything that you think they would not have done, you are sure to keep in the wisest and right path. If you never do anything which among your fellow members at the Bar you would gloss over in telling, you will be safe. Avoid as you would a contagious disease the reputation of being a "slick" lawyer. Many times have I seen the success that has come to such lawyers turn to ashes after success had been won, in the effort that at too late a stage in their career they make to recover the ground they have irretrievably lost in the respect of the courts and their fellow members at the Bar.

Now, the practice of the law is an expert business and its study should be preceded by as good and thorough an education of a general character as one can get. If you can't go through college, you should devote as much time as you can to perfecting such general education as you can. The case of Lincoln is always cited, to justify the theory that anyone without preparation can be a great lawyer. But if you read his life and see what he did, you will realize the education that he had. He had only a few books, but they were the best, and he knew them. He knew the Bible, he knew Shakespeare, he was a natural mathematician, he knew Josephus and history generally, and he was an educated man in the sense of being thoroughly grounded. Then you must admit that

Lincoln was by himself, and it is not safe to generalize as to what you may be able to do from the disadvantages that Lincoln was able to overcome.

The rule of law is that if your client loses by reason of your plain failure to know the law, that is if you don't know a clearly decided authority in your own state, if you don't know the statutes of your own state, and by reason of this lack of knowledge your client loses, he has the right to sue you for malpractice. I assume from the general run of the cases that if your general education is so small that by reason of such ignorance of things that every man ought to know, you lose your case, you are subject to a suit for damages. Chief Justice Rugg of the Supreme Court of Massachusetts said that it is proper and reasonable for the state to require a general education before you begin to practice law. In Indiana, the constitution provides that any man may practice law who has a good moral character, but Indiana is an exception in this regard. The practice of law is not an inalienable right. It is something in the nature of a franchise, to be exercised upon proof of fitness as to legal attainments and character. We cannot let a lot of unscrupulous ignoramuses loose on society, any more than we can authorize a voodoo or quack doctor to practice medicine. That has been laid down by the Supreme Court of the United States.

A lawyer fills a position of a somewhat anomalous character. He is not an officer of the state; not an officer in the sense in which the term is generally used in statutes. But he is an officer in the sense of being an officer of the court, and he is under the disciplinary jurisdiction of the court and must aid the court in the administration of justice. He is so much an officer, so peculiarly and solely of the Court's cognizance that the question has been sometimes mooted: Whether a court must recognize and hear one made a lawyer by the legislature?

The next question is: How is society to be rid of bad lawyers? In England, there are attorneys and solicitors who have the clients and who select the barristers to present the cases in court. In English courts, the judges and all the officers were separated by a great bar of wood and iron running through the middle of the courtroom. That is the reason for the name "bar" and also "barrister," as one who comes to the Bar. Formerly when a barrister was to be disciplined, he was said to be thrown over the bar. Now, he is said to be disbarred. An attorney or solicitor is not "thrown over the bar." His name is enrolled in court as authorized to act as attorney or solicitor. When he is to be removed from office by the

court, his name is said to be stricken from the roll. With us, as there is no distinction between barristers and attorneys, disbarment is the usual procedure. The proceeding is not a criminal one, but civil, for the purification of the Bar. A man may introduce evidence as to his character with respect to the charges against him.

An exclusion from the Bar by the legislature may violate the constitutional provision against *ex post facto* legislation and against bills of attainder. This was held in the case of Mr. Garland who afterwards became Attorney General of the United States. He was practicing in the Supreme Court when the Civil War came on. He joined the Confederacy. After the war, he was pardoned. Congress passed a statute requiring that any one practising before the Supreme Court should take an oath that he had never borne arms against the United States. The court held that this was *ex post facto* because it was a punishment imposed after the act; and second, that it was a bill of attainder in that it in effect designated the persons to be punished without benefit of trial. The Court has distinguished a later case somewhat resembling the Garland case, and reached a different conclusion. A New York statute provided that no man who had been convicted of a felony should be granted a license to practice medicine. It was argued that this was imposing a new punishment after the fact and that it was *ex post facto*. But the court held that the Legislature has a right to protect society from the practice of a profession involving trust and confidence by men of immoral character, and that it was within legislative power to proceed on the theory that convicted felons, though pardoned, were generally not of a class who could be trusted in positions of delicate confidence. The Garland case was distinguished on the ground that engagement in the Confederacy was not a measure of moral character or used as such, but only a political disqualification and punishment. In addition to absolute disbarment, the court often mitigates punishment for unprofessional conduct, by suspension of the offender from the Bar for a certain period so that he may not practice during that time.

Then the court may take certain proceedings to enforce discipline against lawyers in behalf of their clients or litigants where the trust relation has been or is about to be violated, and may use the power of contempt for this purpose, but of this, I expect to speak more specifically later.¹

(To be continued)

¹End of the first lecture.—ED.